BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to the opinions of the Courts below and the grounds of jurisdiction as well as a statement of the case and specifications of error to be urged are contained in the petition.

Summary of Argument.

1. Language contained on a confirmation slip sent by a broker to his customer cannot be held as a matter of fact or law to have become part of the contract between the broker and his customer in the face of (a) failure of the broker to offer any evidence that the customer read the confirmation slips and understood that the verbiage referred to applied to him, and that he agreed to be bound thereby; (b) direct and specific evidence that the customer did not read the confirmation slips and did not see them; (c) evidence that the broker required the customer to sign an agreement at the time when the trading account was opened which did not contain the verbiage which appears on the confirmation slips; and (d) evidence that the confirmation slips were sent by the broker's employees to all its customers as a matter of routine (*Thompson* v. *Baily*, 229 N. Y. 471; *Heaphy* v. *Kerr*, 190 App. Div. 810, aff'd 232 N. Y. 526).

2. Where the agreement between the broker and his customer provides *only* that the broker may "close out any or all transactions in the customer's account without advance notice to the customer," the broker may not sell the customer's securities "over the counter" or on the Stock Exchange unless the sale is a public sale (*Strong* v. *National Mechanics Banking Association*, 45 N. Y. 718, 720; *Wheeler* v. *Newbould*, 16 N. Y. 392).

3. A broker must rely on the agreement as it existed between himself and his customer on the date when he received notice of a third party's claim of ownership to securities in the customer's account and notice that the customer embezzled such securities; he may not rely upon anything done or omitted by the customer to amplify the broker's rights under such agreement after notice of adverse title (*Goshen National Bank* v. *Bingham*, 118 N. Y. 349; *LaMarchant* v. *Moore*, 151 N. Y. 209).

4. The petitioner's failure to insist that the defendants perform their pledge agreement with Alma did not constitute a waiver of such agreement (*Liston* v. *Hicks*, 243 App. Div. 159, aff'd 269 N. Y. 535; *Equitable Cooperative Foundry* v. *Hersee*, 103 N. Y. 25).

ARGUMENT

POINT I

Under New York law the verbiage on the confirmation slips did not become part of the contract.

In *Thompson* v. *Baily*, 220 N. Y. 471, the Court held that, until assented to, the language on a confirmation slip does not constitute a contract; it merely constitutes "a proposal to enter into a contract." Before a confirmation slip can be deemed to have become part of the contract there must be an assent by the customer to be bound thereby (p. 477 of the Court's opinion). The Circuit Court of Appeals justifies the District Court's ruling that the confirmation slips became a part of the contract between Alma and the defendants by saying that "circumstances may be such that an assent to the offer may be inferred" (R. 781).

Even so, there must be evidence on which to rest the inference. But the record fails to show any such evidence. It shows instead that Alma never read or saw the confirmation slips (R. 532-533).

In *Heaphy* v. *Kerr,* 190 App. Div. 810 (aff'd 232 N. Y. 526), the customer denied that he had read any of the confirmation slips. Nevertheless, the Trial Court charged that the language on the confirmation slips was binding on the customer and must be held to be part of the contract.

In reversing, the Appellate Division of the First Department said:

> "No one has reason to expect that in the mere notice of the purchase of stock the broker is inveigling him into some further contract as to rights in collateral which he would not otherwise possess. * * * *With proof positive that he did not read them, and with no legal obligation to read them, there can be no implied consent to the making of a new contract by reason of his failure to express dissent therefrom.*" (Emphasis ours.)

On the second trial there was uncontradicted evidence that Alma had not read or seen the confirmation slips (R. 532-533).

POINT II

A. The verbiage on the confirmation slips is no consent to or waiver of a public sale.

B. The sales on the Stock Exchange were not public sales.

In the case of *Strong* v. *National Mechanics Banking Association,* 45 N. Y. 718, 720, the Court said:

> "Even if demand and notice could be dispensed with, a private sale in such a case cannot be sustained unless the parties have stipulated for such a sale."

Assuming they became part of the contract, the confirmation slips merely gave the defendants the right

> "* * * to close out any or all securities in the customers' account without advance notice to the customer * * *."

Nowhere in the margin card or in the confirmation slips will be found permission to defendants to sell at private sale.

Of the sales made by the defendants of plaintiff's bonds, 99 were sold "over the counter" (R. 581), the rest were sold on the Stock Exchange.

The bonds in question were listed on the "foreign inactive list" of the New York Stock Exchange (R. 430). Such bonds were sold by the broker who desired to sell them by filling out a card giving the name of the security, the price at which he was willing to sell, and the number of bonds available. The broker then would deposit this card in a filing cabinet known in the stock exchange parlance as a "can." In turn, any broker interested in buying bonds in the category mentioned would go to the "can" and look at the cards deposited there by the prospective sellers. If the prospective buyer was willing to buy at the price mentioned on the cards, he would get in touch with the seller's broker and the sale would be arranged (R. 430). There was not even a semblance of competitive bidding or public offering such as customarily prevails in connection with a sale on the floor of the Stock Exchange. A full explanation of the method of sale will be found on pages 500-502 of the record.

Such sales as well as the "over-the-counter" sales were not "public sales" in any sensible meaning of that phrase.

It appears therefore that all the sales of the plaintiff's bonds which were made by the defendants after March 12, 1932, were made at private sale.

On the first appeal, the Circuit Court found "a practice" between the defendants and Alma whereby sales on the Stock Exchange and "over the counter" was supposedly approved. This finding might conceivably be valid as to regular sales and purchases as to which all the confirmation slips had been furnished. It could not be valid as to *forced* sales because before the petitioner served notice and claim of title on the defendants, no forced sales had taken place. The record on the first trial did not clearly show whether or not there were any forced sales prior to the date when the plaintiff gave notice to the defendants. On the second trial, the plaintiff offered evidence to show that there were no forced sales prior to that time (R. 521), and, in fact, secured an admission

from the defendants' witness that all sales prior to the date of notice were on order by Alma (R. 268). But the Circuit Court on the second appeal disregarded this evidence and followed its first decision.

The Circuit Court virtually recognizes that these sales were not public but private, but attempts to justify them by saying:

> "* * * all sales were fairly made, in good faith, at prices currently prevailing in the New York market" (R. 782).

This is no justification under New York law. *Smith* v. *Sarin*, 141 N. Y. 315, 326-327; *Manning* v. *Heidelbach*, 153 App. Div. 790, 793-794.

POINT III

The New York law is that a broker must rely on the agreement as it existed between himself and his customer on the date when he received notice of a third party's claim of ownership.

In its reversal of the first decree the Circuit Court relied upon the letter of April 22, 1932, which the defendants had written to Alma and to which Alma did not object, and the accountant's statement of April 30, 1932, as an "amplification" and approval of the practice shown by the confirmation slips. The District Court on the second trial and the Circuit Court on the second appeal both held that they were bound by the opinion of the Circuit Court on the first appeal. We must therefore assume that though the Circuit Court does not specifically mention the letter of April 22, 1932, and the accountant's statement of April 30, 1932, these exhibits were given the same effect.

But this was contrary to the law which has been long established in New York, which is to the effect that even one receiving embezzled negotiable instruments innocently and in good faith may not enlarge his rights by transactions

with the embezzler after he has received notice from the rightful owners (*Goshen National Bank* v. *Bingham*, 118 N. Y. 349; *LaMarchant* v. *Moore*, 151 N. Y. 209).

POINT IV

The petitioner's failure to demand that defendants perform their agreement with Alma was not a waiver of any of the petitioner's rights.

In the second appeal the Circuit Court says:

> "We might also rest our decision upon another ground. When plaintiff served notice of its claim to ownership it did not request that defendant abide by the pledge agreement with Alma & Co."

The Court concludes that this was a waiver, though it does not state what petitioners had waived. We do not know whether the Circuit Court wished to rest its decision upon that ground or merely thought that it "might" rest it upon that ground if that were necessary. If the Court did rest its decision upon that ground it was wrong certainly under the law of the State of New York (*Liston* v. *Hicks*, 243 A. D. 159, aff'd 269 N. Y. 535; *Equitable Cooperative Foundry Co.* v. *Hersee*, 103 N. Y. 25).

This particular claim of waiver was never made by anyone. It was not mentioned in the first trial or in the first opinion of reversal or in the second trial. The Circuit Court mentions it for the first time on the second appeal.

The record fails to show the slightest basis for this holding. Instead the record shows that the defendants refused to make known the contract between themselves and Alma (see plaintiff's demand for a bill of particulars [R. 58] and defendant's reply to this [R. 59 and 76]). They carefully concealed from petitioner the claim that under an agreement with Alma they had the right to sell without notice or at

private sale. Nor is there anything in the record to the effect that the petitioner "chose to demand unequivocal and immediate return of all the pledged bonds."

The defendants were merely requested that the bonds should not be sold in view of the claim of title. The written notices stated:

> "Dr. Prossinagg comes here with a view to settling these questions with due consideration of the equities involved. We feel that no substantial interest can be affected by leaving the matter in statu quo until he arrives" (R. 30).

The only thing petitioner did was to ask the defendants to join a common agreement accepted by the other stock-brokers (R. 368).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated July 9, 1940.

Respectfully submitted,

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